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In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,
PETITIONERS,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ; JAIME GUTIERREZ; AND ARIZONANS AGAINST CONSTITUTIONAL TAMPERING,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOSA IN SUPPORT OF THE JUDGMENT

STEPHEN G. MONTOYA
Counsel of Record
ALBERT M. FLORES
GEORGE ROBLES VICE III
Of Counsel
337 North Fourth Avenue
Phoenix, Arizona
85003-1572
(602) 271-0070

Attorneys for Respondents Arizonans Against Constitutional Tampering and Thomas Espinosa

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QUESTIONS PRESENTED

1. Does a state law forbidding state elected officials from communicating with their constituents in languages other than English "during the performance of government business" violate the free speech clause of the first amendment?

2. Do petitioners have standing to maintain this action?

3. Does this dispute present a case or controversy?

SUMMARY OF ARGUMENT

Arizonans Against Constitutional Tampering ("AACT") is a political action committee consisting of multilingual state elected officials, state employees and citizens of Arizona. Members of AACT both render and receive official state communications regarding matters of public concern in languages other than English. Members of AACT have a right to disseminate and accept such communications under the free speech clause of the first amendment. *See, e.g., Bond* v. *Floyd,* 385 U.S. 116, 132-33 (1966), and *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 757 (1976). This right is essential to the integrity of the democratic process, and Article 28's abridgement of that right is unprecedented. For this reason, the three state and federal appellate panels to have considered Article 28 have uniformly declared it facially invalid on free speech grounds. *See Yniguez* v. *Arizonans for Official English,* 42 F.3d 1217 (9th Cir. 1994), *Yniguez* v. *Arizonans for Official English,* 69 F.3d 20 (9th Cir. 1995) (en banc), and *Ruiz* v. *Symington,* No. 1 CA-CV 94-0235 (Ariz. App. 1996).

Article 28 is an extremely detailed and precisely drafted language regulation. Its chief characteristic is its applicability to every level of state government. Article 28 provides that "English is the language of the ballot, the public schools and all governmental functions and actions." Ariz. Const., Art. 28, § 1(2). It applies to "the legislative, executive and judicial branches of government," and to "all political subdivisions, departments, agencies, organizations, instrumentalities, local governments and municipalities" of Arizona, including "all government officials and employees during the performance of government business." *Id.,* § 1(3)(a)(iv). Article 28 requires that "[t]his State and all political subdivisions of this State shall act in English and in no other language," and "prohibit[s] [t]his State from using or requiring the use of languages other than English. . . ." *Id.,* § 3(1)(a). Based on this uniformly broad language, Article 28 is "by far the most restrictively worded official-English law to date." M. Arrington, Note, *English Only*

Laws and Direct Legislation: The Battle in the States Over Language Minority Rights, 7 J. L. & Pol., 325, 327 (1991).[1]

Because Article 28 expressly forbids state elected officials from communicating with their constituents in languages other than English "during the performance of government business," Article 28 proscribes "core" political speech and violates the free speech guarantee of the first amendment. *See Colorado Republican Campaign Committee* v. *F.E.C.,* 64 U.S.L.W. 4663, p. 22 (1996). As the United States Court of Appeals concluded in the *en banc* proceeding below,

> Freedom of speech is the foundation of our democratic process, and the language restrictions of Article [28] stifle informative inquiry and advocacy by elected officials. . . . Elected representatives cannot fully serve their constituents if they are precluded from fully expressing their views to, and learning the views of, those constituents. The First Amendment precludes an electoral majority from restricting political communications with a certain segment of the electorate.

Yniguez v. *Arizonans for Official English,* 69 F.3d 920, 950-951 (9th Cir. 1995) (Brunetti, J., concurring), Petitioners' Appendix, pp. 62-64. As this Court acknowledged in *New York Times* v. *Sullivan,* 376 U.S. 254, 273 (1963), the first amendment was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources."

Based exclusively on unsubstantiated fears of "ethnic distrust and separatism," Article 28 threatens to restrict and homogenize the dissemination of information by restricting the politi-

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[1] *See also* D. Baron, *The English-Only Question,* p. 21 ("[A]rticle 28 . . . is the most restrictive of the current wave of official-language laws. . . .") (1990), and J. Crawford, *Hold Your Tongue,* p. 176 (1992) ("Arizona's [Article 28 is] so far the most restrictive [Official English] measure"). The decision below also compared Article 28 with other Official English laws and acknowledged Article 28's unique breadth. *See* Petitioners' Appendix, 12a ("official-English" provisions [outside of Arizona] appear to be primarily symbolic").

cal speech of state elected officials and their constituents. For this simple but fundamental reason, the judgment below should be affirmed.

ARGUMENT

I. Article 28 Proscribes Core Political Speech And Is Subject to Strict Scrutiny.

The first amendment forbids the state from proscribing the content of speech absent clear proof of immediate, significant and demonstrable harm. *See Texas* v. *Johnson*, 491 U.S. 397 (1989). A successful electoral majority may not lawfully silence a minority by imposing restrictions or disparate burdens on the minority's political communications. *See United States* v. *Eichman*, 496 U.S. 310 (1990). Based on these principles, prohibitions of speech regarding matters of public concern are subject to the highest level of scrutiny under the first amendment. *See NAACP* v. *Button*, 371 U.S. 415, 438-439 (1963).

Regulations prohibiting foreign language speech have long-standing antecedents and do not constitute permissible "content-neutral" restrictions of speech. As Thomas Sowell has observed:

> One small but common example of the arrogance of conquerors has been their refusal to learn the languages of the conquered peoples, while *forcing* the latter to learn their language. It was more than two centuries after the Norman conquest of England before there was a king of England who spoke more than a few words of English. Laws and parliamentary proceedings were in French, which was also the language of social discourse among the aristocracy, while the English language and culture remained that of the masses and of the lesser gentry. In other societies as well, the elite among the conquered people have often adopted the language and culture of the new elite, even as junior partners. Thus, in a later era, English spread around the world as the language of the educated classes among the conquered

> peoples in the British Empire — continuing as the world's most widely spoken language, long after the empire itself had disappeared.

T. Sowell, *Race and Culture*, pp. 71-72 (1994) (emphasis supplied). Examples of language proscriptions are common. The English banned the use of Welsh from 1871 to 1939, the Turkish banned the use of Kurdish from the 1920s to the late 1980s, and, under the regime of General Francisco Franco, Spain banned the use of Catalan and Basque from 1938 to the middle 1950s. *See generally*, R. Wardhaugh, *Languages in Competition*, pp. 84, 123 (1987), and *Cambridge Encyclopedia of Language*, p. 34 (1987). In the United States, as shown in Section D below, various language proscriptions were imposed during the World War I era, and some of this Court's first free speech cases considered foreign language speech. *See, e.g.*, *Frohwerk* v. *United States*, 249 U.S. 204 (1919) (German), *Abrams* v. *United States*, 250 U.S. 616 (1919) (Yiddish), and *Schaefer* v. *United States*, 251 U.S. 466 (1920) (German).[2]

Although increased tolerance for language diversity was engendered after the war by this Court's opinion in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), Margaret Blanchard notes that:

> Trying to force immigrants to use the English language or requiring their children to learn it refused to die. In the 1980s, it would again be popular in areas where large Hispanic populations congregated. The underlying concerns in both eras was the need to make residents of the United States alike in language, thought, and action.... Americans continue to harbor a substantial fear of foreign people, foreign languages, and foreign ideas. The Supreme Court decision in 1923 [in

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[2] Hostility to foreign people, foreign languages and foreign ideas also inspired the Alien and Sedition Acts of 1798, which the Court identified as having "first crystallized a national awareness of the central meaning of the First Amendment." *New York Times* v. *Sullivan*, 374 U.S. 254, 273 (1964). *See generally* J. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*, pp. 56-58 (1956).

> *Meyer* v. *Nebraska*] turned back that era's effort to require English-language instruction, but it did little to defuse that fear.

M. Blanchard, *Revolutionary Sparks*, p. 126 (1992). *See also* S. Walker, *Hate Speech*, p. 34 (1994) ("The English Only movement of recent years is a distant echo of the earlier Americanization movement, an attempt to formally define Anglo-Saxon culture as the official version of Americanism and to impose it on everyone").

The unfounded fear of "foreign" languages is reflected in the motivations underlying Article 28:

> The State of Arizona is at a crossroads. It can move towards the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language.
>
> . . . . .
>
> [L]anguage conflicts and ethnic separatism threaten to erode our common bond. . . . This amendment will stop this erosion. . . .

See Legislative Council Arguments Favoring Proposition 106, Joint Appendix, 26. *See also* Robert D. Park, Chairman, Arizonans for Official English, Argument "For" Proposition 106, Joint Appendix, 27 ("Officially sanctioned multilingualism causes tension and division within a state. Proposition 106 will avoid that fate in Arizona"). Based on these statements, it is clear that Article 28 was designed to directly proscribe an entire category of pure speech. Thus, unlike content neutral restrictions motivated by reasons unrelated to the communicative impact of speech, *see, e.g., Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), laws proscribing foreign language speech reflect a choice that is quintessentially political in purpose.

Language proscriptions also have a decidedly non-neutral impact on the content of speech. As this Court acknowledged

in *Hernandez* v. *New York*, 500 U.S. 352, 370 (1991), "[l]anguage permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond." *See also* Native American Language Act, 25 U.S.C. § 2901(9) ("Languages are the means of communication for the full range of human experience and are critical to the survival of cultural and political integrity of any people"), and M. McDougal, H. Lasswell, & L. Chen, *Freedom from Discrimination in Choice of Language and International Rights*, 1 S. Ill. U. L. J. 151 (1976) ("language is a rudiment of consciousness and close to the core of personality; deprivations in relation to language deeply affect identity").

Moreover, by banning entire vocabularies of pure speech, Article 28 necessarily reduces the content of speech. Article 28 is no more a content-neutral restriction on speech than the prohibition on profanity invalidated by this Court in *Cohen* v. *California*, 403 U.S. 15 (1971). *See also Asian American Business Group* v. *City of Pomona*, 716 F.Supp. 1328, 1330 (C.D. Cal 1989) (restriction on use of foreign languages on business signs is a regulation of content).

Finally, but perhaps most importantly, Article 28 proscribes core political speech. Article 28 expressly forbids an elected representative from speaking in her official capacity with a non-English speaking constituent on a matter of public concern. This constitutes an unprecedented intrusion into core political speech subject to the most exacting level of first amendment scrutiny. *See Thomas* v. *Collins*, 323 U.S. 516, 529-31 (1945).

II. Foreign Language Speech and the First Amendment.

A. Polylingualism and the World of the Framers.

The Constitution of the United States . . . was

> made . . . for a people gathered and to be gathered from many nations and of *many tongues*.[3]

The public and private use of languages other than English has been a staple of every era of American history. Although English has always enjoyed linguistic primacy in the United States, this tradition has always coexisted with extensive polylingualism in both the private and the public spheres of American discourse. This tradition of linguistic tolerance has shaped and is a product of the principle of "the freedom of speech" guaranteed by the first amendment.[4]

The polylingualism of the founding era is well-known and has received considerable scholarly attention. *See generally* H. Kloss, *The American Bilingual Tradition* (1977). The polyglot nature of the Revolutionary period reflected the underlying ethnic diversity of the early American populace. The multi-ethnic foundations of Revolutionary America are most famously acknowledged in a 1776 pamphlet of fundamental importance to the Revolution — Thomas Paine's *Common Sense*:

> Europe, and not England, is the parent country of America. This new world hath been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. . . . Not one third of the inhabitants even of this province [Pennsylvania] are of English descent. Wherefore I reprobate the phrase of parent or mother country applied to England only, as being false, selfish, narrow, and ungenerous.

Thomas Paine, *Common Sense*, pp. 84-85 (1776) (Penguin Ed. 1986) (emphasis in original). Paine's remarks were echoed by Tench Coxe a decade later on September 26, 1787, just ten days after the Constitutional Convention adjourned during the debates on the ratification of the Constitution:

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[3] *Hurtado* v. *California*, 110 U.S. 516, 530-531 (1884) (emphasis added).

[4] When interpreting the first amendment, this Court frequently considers the free speech traditions of the era when the Constitution was drafted and ratified. *See, e.g., New York Times* v. *Sullivan*, 376 U.S. 254, 273-277 (1964).

> To take a proper view of the ground on which we stand, it may be necessary to recollect the manner in which the United States were originally settled and established. Want of charity in the religious systems of Europe and of justice in their political governments were the principal moving causes which drove the emigrants of various countries to the American continent. The Congregationalists, Quakers, Presbyterians and other British dissenters, the Catholics of England and Ireland, the Huguenots of France, the German Lutherans, Calvinists, and Moravians, with several other societies, established themselves in the different colonies, thereby laying the ground of that catholicism in ecclesiastical affairs which has been observable since the late revolution: Religious liberty naturally promotes corresponding dispositions in matters of government.

1 *The Debate on the Constitution*, p. 20 (1787) (B. Bailyn ed. 1993).[5]

Contemporary scholarship confirms these demographic observations. As Richard Hofstadter has written:

> During the eighteenth century, . . . the ethnic homogeneity [of seventeenth-century America] was rudely and finally shattered, as Germans, Swiss, Scotch-Irish, Africans, and peoples of other stock migrated or were imported in such substantial numbers that by the time of the Revolution half the population south of New England was non-English.

R. Hofstadter, *America at 1750: A Social Portrait*, p. 17 (1971). Similarly, Robert Wells observes that:

> By 1775 the population of Britain's colonies was increasingly not English. One out of every five Americans

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[5] *See also* J. Hector St. John de Crevecouer, *Letters from an American Farmer*, p. 68 ("What is an American?. . . . They are a mixture of English, Scotch, Irish, French, Dutch, Germans, and Swedes.") (1782) (Penguin Ed. 1986).

> traced his or her roots to Africa, not Europe.... Although a few non-English had come to the colonies before 1700, after that year Germans, Irish, Scots, and Welsh all began to move to America. The traditional estimate was that about 30% of the total population were whites other than from England. In the eighteenth century, Scots and Welsh, as well as Germans, were quite different from the English and proudly conscious of that fact. Recently, a new estimate of the ethnic composition of the United States in 1790 (which should reflect the situation in 1775) has suggested that there were [even] more non-English than previously thought.

R. Wells, "Population and Family in Early America," in *The Blackwell Encyclopedia of the American Revolution*, p. 45 (1994).

The ethnic diversity of the Revolutionary era has import beyond mere cultural history. The years immediately preceding the Revolution witnessed the largest influx of immigration in the history of the new world. *See* B. Bailyn, *Voyagers to the West*, pp. 24-28 (1986). Absent the population growth attendant to this immigration wave, the thirteen colonies would have lacked the human capital that proved essential to the success of the Revolution. *See* R. Wells, "Population and Family in Early America," in *The Blackwell Encyclopedia of the American Revolution*, pp. 39, 50 (1994). American Independence rests in large measure on the collective efforts of these Americans of English, Scottish, Irish, Dutch, German, French, and African descent.

This diverse ethnic mix resulted in a correspondingly diverse linguistic mix.

> The sounds of Africa, Europe, the Mediterranean, and the West Indies enriched the coastal air [of eighteenth-century America] as much as did the spices and aromas of various ethnic cuisines.... We tend to forget that passionate conversations about religion and politics, as well as family matters, were as likely to be thought

> through and spoken in vigorous German, French, Dutch, Yoruba, Gullah, Spanish, Swedish or Farsi....

Norman S. Grado, "The Cultural Effects of the Revolution," in *The Blackwell Encyclopedia of the American Revolution*, p. 579 (1994). It is also important to note in this regard that many of the Scottish, Welsh and Irish emigrants in Revolutionary America spoke Gaelic (and dialects thereof) and were unable to communicate in English. *See* B. Bailyn, *Voyagers to the West*, pp. 575-576 n.2 (1986), and R. Morris *Witnesses at the Creation*, p. 121 (1985).

In addition to multiple languages native to Europe and the British Isles, over one thousand Native American languages were spoken in eighteenth-century America. *See* A. Josephy, *The Indian Heritage of America*, pp. 12-15 (1968). The prevalence of these indigenous tongues had a significant impact on the European settlers of early America:

> Traveling in New York in 1776, Joseph Bloomfield, then a captain in the Third New Jersey Regiment and later governor of New Jersey, heard spoken on a daily basis English, High Dutch, Low Dutch, French, Mohawk, Oneida, Seneca, Cayuga, Onondaga, and Tuscarora.

C. Calloway, *The American Revolution in Indian Country*, p. 17 (1995). Indigenous languages were so pervasive during the Revolutionary era that the European settlers "incorporated Algonkian, Iroquoian, and Muskhogean terms into their vocabulary." *Id.* (In fact, like several other states, the Commonwealth of Massachussetts is named after a Native American tribe.) The European settlers also strived to communicate with the natives in their indigenous tongues. One of the largest printings in the history of the Colonial American press involved a translation of the Bible into a Native American tongue. *See* L. Wroth, *The Colonial Printer*, p. 17 (1964). Commonly known as the "Eliot Indian Bible," approximately 2500 copies of the text were printed in Cambridge, Massachusetts by 1665. *Id.*

African-Americans — who comprised approximately one fifth of the inhabitants of Revolutionary America — also spoke various African-related dialects. As Stephanie Grauman Wolf observes:

> The many languages of Africa were integrated with each other [in eighteenth-century America], as well as with English, to form the Creole languages distinctive in different parts of the southern colonies. We are familiar with the Gullah tongue of the islands of the eastern coast of South Carolina because it has survived into the twentieth century, but many contemporaries noticed Virginia blacks spoke a special "mixed dialect between Guinea and English," while a missionary in 1748 reported that blacks in the Chesapeake had "a language peculiar to themselves, a wild confused medley of Negro and corrupt English, which makes them very unintelligible except to those who have conversed with them for many years."

S. Wolf, *As Various as Their Land: The Everyday Lives of Eighteenth-Century Americans*, p. 264 (1993). Like their European counterparts in the new world, African-Americans took pride in their various tongues and were reluctant to forsake them in favor of English. *Id. See also* J. Blassingame, *The Slave Community*, p. 25 (1979).

Foreign language speech was not limited to the spoken word; the foreign language press was active throughout the Revolutionary era. Benjamin Franklin published the first German language newspaper in America in 1732 — the "*Philadelphische Zeitung.*" *See* K. Bartel, "German and the Germans at the Time of the American Revolution," 60 *Modern Language Journal*, p. 98 (1976). Approximately thirty-eight different German-language newspapers were published in America between 1732 and 1800. *See* K. Conzen, "Germans," *Harvard Encyclopedia of American Ethnic Groups*, p. 409 (1980). In fact, John Peter Zenger was a "poorly educated German immigrant" who probably spoke more German than English, and one of the first significant controversies in America regarding

freedom of the press and the law of seditious libel involved a 1758 edition of the "*Philadelphische Zeitung*," apparently no longer owned by Benjamin Franklin by that time. *See* L. Levy, *Emergence of a Free Press*, pp. 39, 52 (1985), and J. Allen, *Printers and Press Freedom*, pp. 132-134 (1988).

One of the most important foreign language newspapers published during the Revolutionary era was the "*Wochentliche Pennslyvanische Staatsbote.*" *See* B. Bailyn, *Voyagers To The West*, pp. 62, 310, 402 (1986). In addition, "[t]wo Pennsylvania magazines were issued in the German language, and Samuel Hall, in 1789, brought out twenty-six issues of a periodical in French with the title, *Courier de Boston.*" L. Wroth, *The Colonial Printer*, p. 239 (1964). The significance of the foreign language press in Colonial America is evidenced by the fact that "the largest book produced in the colonies before the Revolution" was *Der Blutige Schau-Platz*, a massive 756 page Mennonite book of prayer published in German. *Id.* at pp. 259-260. Indeed, Germans played a singularly influential role in the creation and development of the publishing industry in eighteenth-century America. *Id.* at pp. 72-77, 87, 95, 103-104, 117-118, 126-129, 259-263.

Government communications in the Revolutionary era reflected the linguistic diversity of the period. In the public sphere at the national level, the Continental Congress published various official documents in English, German, and French editions, including the Articles of Confederation and the famous 1774 Address to the people of Quebec lauding the relationship between a free press and self-government. *See generally*, J. Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English," 77 Minn.L.Rev. 269, 284-287 (1992). The Continental Congress also issued numerous other documents in German and French in connection with its successful efforts to recruit troops from these groups; eight companies of Germans from Maryland and Pennsylvania ultimately fought in the Continental army, all of which were probably commanded in the German tongue. *Id.*

As James Wilson noted at the Constitutional Convention, "almost all of the Gen[eral] officers of the Pen[nsylvania] line [in the Continental army] were foreigners." 2 M. Farrand, *The Records of the Federal Convention,* p. 269 (1937).

America's alliance with France during the Revolution also often necessitated official communications in French. George Washington is probably the only major founding father who was not fluent in French. With the appointment of several high ranking French officers to the Continental army, Washington's "councils of war became increasing bilingual," with Alexander Hamilton often serving as translator. *See* J. Flexner, *Washington: The Indispensable Man,* p. 101 (1969), and 1 *The Debate on the Constitution,* p. 1008 (B. Bailyn ed. 1993). The founding generation was so comfortable conversing in French in official settings that Benjamin Franklin's concluding remarks on the last day of the Constitutional Convention (which were read for a weary Franklin by James Wilson) ended with a French quip, "*Il n'y a que moi qui a toujours raison.*" 1 *The Debate on the Constitution,* p. 3 (B. Bailyn ed. 1993).

Official polylingualism was also common at the local level. In eighteenth-century Pennsylvania, "[i]n legal action[s] and court proceedings . . . , documents in German were just as valid as those in English." W. Parsons, "Representation of Ethnicity Among Colonial Pennsylvania Germans," in F. Shuffelton, *A Mixed Race: Ethnicity in Early America,* p. 120 (1993). Similarly, under the leadership of Benjamin Franklin, petitions in German (and English) were distributed to be signed by the electorate and submitted by the Pennsylvania Assembly to the British Parliament requesting that the Penn proprietorship be abolished and replaced with a royal charter. *See* R. Middlekauff, *Benjamin Franklin and His Enemies,* pp. 87, 98-99 (1996).

The Pennsylvania polylingual tradition is especially instructive when considering the original understanding of "free speech" given the fact that Pennsylvania was the only state whose constitution had a "free speech" clause when the Bill of Rights was drafted and ratified in 1791. *See* L. Levy, *Emergence*

of a Free Press, p. 5 (1985). Moreover, the capital of Pennsylvania — Philadelphia — was the most populous, prosperous city in Revolutionary America, aptly described by Dr. Benjamin Rush as "the capital of the new world." Quoted in E. Foner, *Tom Paine and Revolutionary America,* p. 19 (1976). Reflecting its size, wealth, and sophistication, Philadelphia was the situs of the first Continental Congress, the writing of the Declaration of Independence, the writing of the Articles of Confederation, and the Constitutional Convention. The free speech tradition of this capital of Revolutionary thought is some of the best evidence of the early meaning of freedom of expression under the first amendment.

About half of the population of Philadelphia was either German or Irish, and these two linguistically distinct groups were active participants in the social and political life of the city. *See generally* E. Foner, *Tom Paine and Revolutionary America,* pp. 46, 48, 53, 55, 57, 64, 127-128, 163, 187 (1976). Germans were such a significant force in Pennsylvania politics that Benjamin Franklin feared that in time translators would be required in order for one half of the Pennsylvania Assembly to communicate with the other. *See* 4 *The Papers of Benjamin Franklin,* pp. 484-485 (1753) (Labaree ed. 1961). During the Revolutionary War, Germans served on Pennsylvania's Revolutionary Council and fought in the citizen's militia. *See* E. Foner, *Tom Paine and Revolutionary America,* p. 64 (1976). In 1788, Pennsylvania Germans even demanded proportional representation in the elections for the new federal congress and presidential electors. *See* G. Wood, *The Radicalism of the American Revolution,* pp. 245, 260-261 (1991). (The demand was dropped only when both political parties — the Federalists and the Anti-Federalists — recruited German candidates. *Id.*)

The English-speaking majority of Pennsylvania was not oblivious to the apparent threat posed to English primacy by the German tongue. Franklin's remarks about "the Palatine Boors . . . swarm[ing] into our settlements, and by herding together establish[ing] their language and manners to the exclusion of ours" . . . were well-known (and ultimately damaging to

his immediate political ambitions). *See* 4 *The Papers of Benjamin Franklin,* p. 227 (1751) (Labaree ed. 1961), and R. Middlekauff, *Benjamin Franklin and His Enemies,* pp. 87, 98-99 (1996). As Richard Middleton observes:

> The numbers [of Germans in Pennsylvania] were so high that fears were expressed for the survival of the English inhabitants. In 1727 a bill was passed requiring all immigrants to take an oath of loyalty, and in the early 1740s there was talk of barring anyone from office who did not speak English, the first demonstration of that phenomenon known as nativism.

R. Middleton, *Colonial America,* pp. 343-344 (1992). Notwithstanding these fears, no action prohibiting the private or official use of foreign languages was ever taken, and the primacy of English endured in Pennsylvania throughout the eighteenth century (and beyond).[6]

Pennsylvania's polylingual tradition was not unique. "An estimated 10 percent of the pre-Revolutionary population was German-speaking, . . . [and Georgia's] population was so polyglot that a successful magistrate needed to speak fluently in at least three languages and preferably four. . . ." B. Bailyn, *The Peopling of British North America,* pp. 16-17 (1986). New York, Maryland, Virginia, North Carolina, South Carolina, Florida, Alabama (then called "West Florida") and Louisiana also had significant polylingual communities during the Revolutionary era, speaking Dutch, French, German, Gaelic, Greek, Italian,

[6] Of course, the framers were well aware of the Pennsylvania polylingual tradition. The Constitutional Convention met in the Philadelphia State House while the polylingual Pennsylvania legislature was in session upstairs. *See* E. Morgan, *The Birth of the American Republic,* p. 150 (1992). In addition, when prejudice against foreigners surfaced at the Constitutional Convention, Scottish-born James Wilson (with Madison's support) attempted to neutralize the attack by attributing Pennsylvania's size and prosperity to immigration. Despite this prejudice, no one at the Constitutional Convention advocated or suggested any form of an English-only rule. *See* 2 M. Farrand, *The Records of the Federal Convention,* p. 269 (1937).

Spanish and other non-European languages. *See* B. Bailyn, *Voyagers to the West,* pp. 19, 25, 27, 455-461, 467, 478, 575-576 (1986).

The official polylingualism of the founding era is perhaps best illustrated by the definitive official expression of the original understanding of the "freedom of the press," a 1774 proclamation in French issued by the first Continental Congress to the people of Quebec in an attempt to obtain support for the Revolution. *See* D. Anderson, *The Origins of the Press Clause,* 30 UCLA 455, 463-464 (1983). The English language version of the Address states:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and the arts in general, in its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs.

1 *Journal of the Continental Congress,* p. 108 (1774).[7] The motto adopted for the new Nation — *"E pluribus unum"* — also reflects the official polylingualism of the era. The federal government was not alone in choosing a foreign language motto. The oldest extant flag of pre-constitutional America (from Bedford, Massachusetts) bears the Latin motto, *Vince aut Morirre,* (Conquer or Die). *See* D. Fischer, *Paul Revere's Ride,* pp. 162-163 (1994). Of the twelve states to participate in the Constitutional Convention, seven had foreign language mottos or official seals. *See* M. Bradford, *Founding Fathers* (1994).[8]

[7] Seven members of the first Continental Congress of 1774 participated in the Constitutional Convention of 1787. *See* R. Morris, *The Forging of the Union 1781-1789,* p. 269 (1987).

[8] Ironically, the Official Seal of the State of Arizona also contains a foreign language motto, *"Ditat Deus."*

Based on the express and unqualified language of the free speech clause itself and the pervasive private and official use of foreign language speech throughout the Revolutionary era, the framers of the first amendment obviously believed that foreign language speech constituted "speech" for first amendment purposes. Although the framers were acutely aware of the existence of foreign language speech in the public sphere — Franklin publicly lamented it — they did nothing to suggest that such speech could be lawfully abridged; to the contrary, they associated language proscriptions with the European oppression from which they had fled to America to avoid. As Justice Joseph Story explained in his *Commentaries on the Constitution*,

> The next clause of the amendment respects the liberty of the press. "Congress shall make no law abridging the freedom of speech, or of the press. . . ." A little attention to the history of other countries in other ages will teach us the vast importance of this right. It is notorious, that even to this day, in some foreign countries it is a crime to speak upon any subject, religious, philosophical, or political, what is contrary to the received opinions of the government, or the institutions of the country, however laudable may be the design, and however virtuous may be the motive. . . . The Bible itself, the common inheritance, not merely of Christendom, but of the world, has been put exclusively under the control of government; and not allowed to be seen, or heard, except in a language unknown to the common inhabitants of the country. To publish a translation in the vernacular tongue, has been in former times a flagrant offense.

J. Story, *Commentaries on the Constitution of the United States,* pp. 703-705 (1833).

These comments reflect the framers' original association of language restrictions with the religious and cultural oppression of Europe. A leading scholar in the history of American multilingualism, Shirley Heath, has noted:

> [E]arly political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms.

S. Heath, "Language and Politics in the United States," in *Linguistics and Anthropology,* pp. 267, 270 (1977). Just as the framers rejected the idea of an established religion or a ministry of culture, they rejected the idea of an official language. *Id. See also* S. Heath, *A National Language Academy? Debate in the New Nation,* 11 *International Journal of the Sociology of Language,* p. 9 (1976).[9]

Professor Heath's findings in this regard are eloquently confirmed in Gordon Wood's Pulitzer Prize winning study, *The Radicalism of the American Revolution:*

> The revolutionary generation was the most cosmopolitan of any in American history. The revolutionary leaders never intended to make a national revolution in any modern sense. They were patriots, to be sure, but they were not obsessed, as were later generations, with the unique character of America or with separating America from the course of Western civilization. As yet there was no sense that loyalty to one's state was incompatible with such cosmopolitanism. . . . The truth was, said Thomas Paine in *Common Sense,* that Americans were the most cosmopolitan people in the world. They surmounted all local prejudices. They regarded everyone from different nations as their countryman and ignored neighborhoods, towns and countries as distinctions too limited for continental minds. . . . America, by uniting the different kindred of the earth, had a duty to eradicate national prejudices and to make all humanity members of one extensive family.

G. Wood, *The Radicalism of the American Revolution,* pp. 222-223 (1991) (internal quotation marks omitted).

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[9] Even the most famous proponent of a "National Language" — Noah Webster — believed that legislation in the area of language was superfluous and contrary to the sovereignty of the American people. *See* D. Boorstein, *The Americans: The Colonial Experience,* p. 288 (1958).

Article 28 is a radical repudiation of this foundational free speech tradition.

B. Polylingualism and the Fourteenth Amendment.

The linguistic diversity of the founding era did not end with the ratification of the Constitution and the Bill of Rights. The polylingual tradition continued unabated in nineteenth-century America and is richly illustrated in the Civil War and Reconstruction years. A brief examination of this transformative period of constitutional history is necessary to appreciate the fourteenth amendment's impact on the free speech rights of minority groups.

The jurisprudential roots of the fourteenth amendment lay in the ideology of the abolitionists and the radical Republicans. *See generally,* J. TenBroek, *The AntiSlavery Origins of the Fourteenth Amendment* (1951), and H. Trefousee, *The Radical Republicans: Lincoln's Vanguard for Racial Justice,* pp. 15-19 (1969). Long before the equal protection clause was ratified by the several states in 1868, opponents of slavery had articulated a theory of equality under law ultimately derived from the Declaration of Independence and the natural rights tradition. *See* W. Wiecek, *The Sources of AntiSlavery Constitutionalism in America,* pp. 264-265 (1977), and L. Litwack, *North of Slavery,* p. 9 (1961). These ideas served as the conceptual predicate for the substantive provisions of the fourteenth amendment and shaped the evolution of the free speech rights of minorities. *Id. See also* M. Curtis, *No State Shall Abridge,* pp. 42-56 (1986).

Wendell Phillips was one of the most influential spokesmen of the abolitionist cause in the Civil War era. *See* J. McPherson, *The Struggle for Equality,* pp. 51, 127-128, 366 (1966). His basic views on equality during the antebellum period reflected a growing Northern majority. *Id.* Soon after the firing on Fort Sumter in 1861, Phillips concluded his most famous speech by affirming his faith in the principle of equality:

> I believe in the possibility of justice, in the certainty of union. Years hence, when the smoke of this conflict clears away, the world will see under our banner *all*

> *tongues,* all creeds, all races — one brotherhood — and on the banks of the Potomac, the Genius of Liberty, robed in light, four and thirty stars for her diadem, broken chains under her feet, and an olive branch in her right hand.

Id. at p. 51 (emphasis added). Over two hundred thousand copies of this speech were distributed throughout the Union, making it one of the most widely read pieces of abolitionist literature in the history of the movement. *Id.* The ideal of equality expressed in Phillips' speech was standard abolitionist partyline and was echoed by another leading abolitionist of the era, Samuel J. May of New York:

> [The mission of America] was to show the world that *all* men, not white men alone, but all, of every complexion, language and lineage have equal rights to life, liberty and the pursuit of happiness. . . .

Id. at p. 228 (emphasis in original).

These views were shared by many Republicans in the early 1860's. *See* A. Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 Yale L.J. 1193, 1275-77 (1992). For instance, in 1861 Abraham Lincoln — when criticizing a proposed amendment to the Massachusetts' constitution imposing a two year residency requirement on voting by naturalized citizens — explained that:

> I have little notoriety for commiserating the oppressed condition of the negro, and I should be strangely inconsistent if I could favor any project for curtailing the existing rights of white men, even though born in different lands, and speaking different languages from myself.

D. Donald, *Lincoln,* p. 231 (1995). In fact, the influential "German-wing" of the Republican party led by (German-born and German-speaking) Carl Schurz effectively purged or silenced any significant nativist sentiments in the party by the end of the 1850s. *See* E. Foner, *Free Soil, Free Labor, Free Men,*

p. 257 (1995). Due to the efforts of Schurz and his associates, the Republican platform of 1860 contained an anti-nativist plank opposing "any state legislation by which the rights of citizens hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the rights of all classes of citizens, whether native or naturalized. . . ." *Id.* Thus, on the eve of the Civil War, both the abolitionists and the Republicans had publicly identified foreign language speakers as a class of individuals entitled to the equal protection of the laws.

By 1866, after Appomattox, the ratification of the thirteenth amendment, and the passage of the Civil Rights Act of 1866, these principles were orthodoxy for the radical and moderate Republicans who drafted the fourteenth amendment. *See generally* E. Foner, *Reconstruction,* p. 257 (1988). For example, Representative Thaddeus Stevens of Pennsylvania — the head of the House delegation to the Joint Committee on Reconstruction that officially reported the fourteenth amendment — explained that Reconstruction legislation passed pursuant to section two of the thirteenth amendment was designed to assure that "all laws be impartial, *without regard to language,* race or former condition." Quoted in D. Donald, *The Politics of Reconstruction, 1863-1867,* p. 58 (1965) (emphasis added). Representative Stevens also subsequently remarked that the fourteenth amendment required that "the same laws must and shall apply to every mortal, American, Irishman, African, German, or Turk." Quoted in W. Nelson, *The Fourteenth Amendment,* p. 116 (1988). Of course, based on their experience in state electoral politics, Representative Stevens and his colleagues knew that many members of these ethnic groups could not communicate effectively in English.

In accordance with this conception of equality — and ever mindful of their German-speaking colleagues and constituents — the Reconstruction framers refused to limit the right to vote to only those citizens who could read the Constitution and write their names in English. On June 27, 1866, during the first session of the 39th Congress, Senator Lot Morrill of Maine proposed an amendment to a suffrage bill for the District of Columbia requiring English literacy, contending that:

> I believe for the sake of unity, unity in our civilization, unity in our language, unity in our sentiments and opinions, that we ought to inculcate as a standard and a formula that the laws should always be printed in the English language; and so far as any [suffrage] qualification is concerned, certainly our civilization is worth but little in its influence and its effect upon aliens and foreigners, if at least we do not require them to speak our language.

Congressional Globe, 39th Cong., 1st Sess. 3433 (1866). In arguing against the proposed amendment, Senator Samuel Pomeroy of Kansas stated:

> [T]he man who becomes an American from choice, who looking over the ocean and seeing America, learning of our institutions, breathing somewhat of our freedom, longing to identify himself with us in this great struggle for self-government, comes here and voluntarily assumes the duties of a citizen, enters our Army, and carries our flag to victory; I say such a man, if he cannot write a word in English, is an American; he is a patriot; he is loyal; and he is entitled to vote.

Id. Senator Henry Wilson of Massachusetts echoed Pomeroy's views, exclaiming "why tell a German, a man of intelligence and character, that he must read the Constitution in the English language? Why say to the Frenchman, or to any foreigner who comes here, that he must be able to read and write in the English language? I think it is all wrong." *Id.* Based on these remarks, Senator Morrill voluntarily withdrew his proposed amendment without further debate. *Id.*

Senator Pomeroy's comments regarding immigrants "enter-[ing] our army and carr[ying] our flag to victory" were not hypothetical. As James McPherson observes,

> the substantial number of immigrants in the Union Army gave rise to the long-standing southern myth that the majority of Yankee Soldiers were foreign hirelings. . . . Of some two million white soldiers and sailors, half a million had been born abroad.

J. McPherson, *Battle Cry of Freedom,* p. 606 (1988). Of the half million foreign born soldiers serving in the Union Army — one forth of the entire armed forces — the majority were German or Irish, numbering 200,000 and 150,000 respectively. *See* B. Wiley, *The Life of Billy Yank,* p. 307 (1952). In addition to Germans and Irish,

> Swiss, French, Italian, Mexican and Polish representation in the Union Army was indicated by such regimental designations as the Swiss Rifles (Fifteenth Missouri); Gardes Lafayette (Fifty-fifth New York), commanded by Regis de Trobriand; Garibaldi Guard (Thirty-ninth New York); Martinez' Militia (First New Mexico); and Polish Legion (Fifty-eighth New York).

Id. at pp. 310-311.

The multi-ethnic composition of the Union Army made it correspondingly multilingual.

> The diverse national background of the Union soldiery manifested itself in many ways. One of the most noticeable of these was the babel of tongues that rose from the camps. The colonel of one regiment which included fifteen nationalities gave commands in seven different languages.... The most powerful influence in leveling barriers of nationality was the confidence and respect born of sharing hardship and danger. Courage in battle was the mark of a man, and the soldier who proved his bravery was not long disparaged for peculiarities of speech.

See B. Wiley, *The Life of Billy Yank*, pp. 310-311 (1952). Absent the contributions of these 500,000 soldiers, Union victory would have been dubious or more costly won. *See generally* B. Wiley, *The Road to Appomattox,* pp. 113, 119-120 (1956).

The polyglot nature of the Union Army reflected the polyglot nature of the Union. "*Heterogeneous* was the only adjective that could describe the American people [on the eve of the

Civil War].... [B]y 1850 the American population included representatives of almost every race and language in the world." D. Donald, *Liberty and Union,* p. 5 (1978) (emphasis in original). Ever cognizant of the importance of the foreign language vote, politicians in the Civil War era were careful to communicate with these voters in their native tongues. In 1856 then presidential candidate James Buchanan (a Pennsylvanian) had a campaign pamphlet discussing the controversy over slavery in the Kansas territory translated into German "for circulation in Pennsylvania's German counties." K. Stamp, *America in 1857,* p. 159 (1990). Similarly, in his unsuccessful 1858 senatorial campaign against Stephen Douglas, Abraham Lincoln had his famous "House Divided" speech (among others) translated into German to appeal to Illinois's influential German constituency. *See* D. Donald, *Lincoln,* pp. 211, 231 (1995). Carl Schurz and Gustave Koerner also campaigned extensively in German for Lincoln in the 1860 presidential election, and several scholars have argued that German support was essential to Lincoln's success in the election. *See* 2 A. Faust, *The German Element in the United States,* pp. 150-187 (1927), and E. Foner, *Free Soil, Free Labor, Free Men,* p. 259 n. 71 (1995).

The polylingualism of this foundational era of constitutional history is also illustrated by the publication of Minnesota's constitution of 1857 in English, German, Swedish, Norwegian and French, *see* J. Crawford, *Hold Your Tongue,* p. 44 (1992), California's constitution of 1849 in English and Spanish, Cal. Const. of 1849, and Louisiana's constitution of 1845 in English and French. *See Journal of the Proceedings of the Convention of Louisiana,* pp. 313-315 (1845).

Lastly, when considering the meaning of the fourteenth amendment, it is important to remember that the practice of slavery acted as a straightjacket on the first amendment that was not removed until the outbreak of the Civil War and the passage of the fourteenth amendment. As Akhil Amar observes:

> From the 1830's on, the abolitionist crusaders had understood that freedom of speech for all men and

> women went hand in hand with freedom of bodily liberty for slaves. The slave power posed a threat to freedom — of all kinds — and could support itself only through suppression of opposition speech, with gag rules on anti-slavery petitions, bans on "incendiary" publications, intrusions on the right of peaceable assembly, and so on.

A. Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 Yale L.J. 1193, 1275 (1992). *See also* W. Freehling, *The Road to Disunion,* pp. 98-118, 289-352 (1990). Slavery's destructive impact on the first amendment was the subject of frequent petitions by citizens to the 39th Congress. For example, on January 30, 1866, Senator Howard of Michigan presented a petition from "certain German naturalized citizens of the United States residing in Detroit" seeking "prohibition of all restrictions of free speech, free press, free assemblage and free instruction." *Congressional Globe,* 39th Cong., 1st Sess. 494 (1886).

In light of the problem of slavery and free speech, by means of the fourteeth amendment, the 39th Congress sought to abolish the regulations, practices and customs that stifled free speech. As Justice Bradley acknowledged in his dissenting opinion in the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 123 (1873):

> The mischief to be remedied [by the fourteenth amendment] was not merely slavery, . . . [but also] that intoleration of free speech and free discussion which often rendered life and property insecure, and led to so much unequal legislation.

See also, C. Antieau, *The Original Understanding of the Fourteenth Amendment* pp. 24-25 (1981), and M. Curtis, *No State Shall Abridge,* pp. 32, 49-50, 56, 133-139 (1986).

The framers of the fourteenth amendment accomplished their free speech goals by incorporating an equal protection component into the concept of free speech which prohibited the imposition of state restrictions on speech based on subject matter or group classification. As Professor Amar explains:

> [T]he very meaning of freedom of speech . . . was subtly redefined in the process of being incorporated [into the fourteenth amendment]. In the eighteenth century the paradigmatic speaker was someone like John Peter Zenger or James Callender, a relatively popular publisher saying relatively popular things critical of less popular government officials. In the mid-nineteenth century the paradigm shifted to the Unionist, the abolitionist, and the freedman: to speakers like Samuel Hoar, Harriet Beecher Stowe, and Frederick Douglass. . . .
>
> The shift from Zenger and Callender to Hoar, Stowe, and Douglass was subtle but significant. All can be seen as "outsiders," but with an important difference. As representatives of the Fourth Estate, Zenger and Callender were outside the government that tried to censor them, but Hoar, Stowe, and Douglass were outsiders in a much deeper sense. Vis-a-vis the Southern society trying to suppress their speech, Hoar, Stowe, and Douglass were geographic, cultural, and ethnic outsiders who were critical of dominant social institutions and opinions. Put this way, this shift directs us away from Madison's first concern in *The Federalist* No. 51 (the "agency" problem of protecting the people against unrepresentative government), toward his second concern (protecting minorities from "factional" majority tyranny). The new First/Fourteenth Amendment tradition is less majoritarian and more libertarian. . . .
>
> The 1866 redefinition [of free speech] changed the central purpose . . . of freedom of speech, making central certain types of speech that had previously been far more peripheral: religious speech, artistic speech, and most importantly, minority speech.

A. Amar, *The Bill of Rights and the Fourteenth Amendment,* 101 Yale L.J. 1193, 1277-1278, 1282 (1992). Thus, when seen through the lens of the fourteenth amendment, the principle of free speech prohibits the imposition of disparate restrictions on

minority speech. As Senator Howard of Michigan stated in his famous speech presenting the final version of the amendment to the Senate floor, "[the fourteenth amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Congressional Globe,* 39th Cong. 1st Sess. 2766 (1866). *See also, Barbier* v. *Connally,* 113 U.S. 27, 30 (1884) ("Class legislation, discriminating against some and favoring others, is prohibited [under the fourteenth amendment]").

The equal protection prohibition of "class legislation" was recently illustrated by this Court's opinion in *Romer* v. *Evans,* 64 U.S.L.W. 4343, 4355 (1996):

> It is not within our constitutional tradition to enact [class-based] laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Sweatt* v. *Painter,* 339 U.S. 629, 635 (1950) (quoting *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) (quoting *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886)).

Like the provision invalidated by this Court in *Romer,* Article 28 "identifies persons by a single trait" (foreign language speech) and makes it "more difficult for one group of citizens than for all others to seek aid from the government." *Id.* at 4356. This regime clearly discriminates based on categories of

speakers and thus violates basic equal protection requirements. Indeed, the debates of the 39th Congress reveal a clear and consistent intent to prohibit the state imposition of disparate burdens on groups based on classifications of race, national origin, language, religion or ideological persuasion.

In sum, Article 28 defies the equal protection component of free speech. A class of individuals — foreign language speakers — specifically identified as being within the ambit of fourteenth amendment protection by the framers of the amendment is denied the right to communicate in the manner that its English-speaking counterparts freely enjoy. This is the very type of class-specific legal impediment that the fourteenth amendment was designed to abolish.

C. Polylingualism and Development of Modern Free Speech Jurisprudence.

The American tradition of linguistic tolerance is reflected in the foundations of this Court's free speech jurisprudence. In the case that many scholars identify as the starting point of modern first amendment law, *Abrams* v. *United States,* 250 U.S. 616 (1920), the Court considered foreign language speech (Yiddish) and implicitly refused to distinguish between English and foreign language speech for first amendment purposes. In *Abrams,* several Russian Jewish emigres challenged their convictions under the Espionage Act of 1917 as violative of their free speech rights based on the fact that the only evidence of "espionage" consisted of distributing leaflets in English and Yiddish condemning America's involvement in the Russian Revolution.

Although the Court translated and considered the Yiddish leaflet in *Abrams,* which was apparently more "seditious" than its English language counterpart due to mistranslation, both the majority opinion by Justice Clarke and the legendary dissenting opinion by Justice Holmes treat the two languages as standing on equal footing for first amendment purposes.[10] Not

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[10] *See generally* R. Polenberg, *Fighting Faiths: The Abrams Case, The Supreme Court and Free Speech,* pp. 74-75, 234-238 (1987).

only does Holmes *not* suggest that foreign language speech on matters of public concern falls outside the scope of first amendment protection or is somehow entitled to less protection than English speech — to the contrary - - he concludes that it is virtually inviolate:

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had just as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.

Abrams, 250 U.S. at 629 (1920). Moreover, by equating an individual's right to advocate and criticize the government with the government's right to print the laws, Justice Holmes displays a masterful understanding of the theory of popular sovereignty predicating the first amendment discussed extensively forty years later in this Court's opinion in *New York Times* v. *Sullivan,* 376 U.S. 254, 273-277 (1963). (*See* Section D below.)

The Court also considered foreign language speech in the free speech context in *Frohwerk* v. *United States,* 249 U.S. 616 (1919), and *Schaefer* v. *United States,* 251 U.S. 466 (1922), both of which involved the question of whether speech published in three German-language newspapers — the *Missouri Staats Zeitung,* the *Philadelphia Tageblatt,* and the *Philadelphia Sonntagsblatt* — violated the Espionage Act of 1918. Although the Court translated the speech in question from German to English in both cases, it did not state or suggest that foreign language speech did not constitute "speech" under the first amendment. In fact, in his dissenting opinion in *Schaefer,* Justice Brandeis argued that the majority opinion's conclusion that Schaefer's speech was seditious was based on an inaccurate translation of the original German text, which he printed alongside the English language version, noting critically that

"[e]vidently both the jury and the trial judge failed to examine the German original." 251 U.S. at 488 (1922).[11]

This Court's implicit but uniform refusal to discriminate against foreign language speech in this important trilogy of free speech cases was no accident. Discrimination against the German language was both well-known and rampant during the World War I era. As Margaret Blanchard writes:

> In fact, [during the first world war] a whole subculture in American Society was virtually destroyed because of irrational fears.... [T]he American people were so frightened of and so enraged at anything German that almost all vestiges of that heritage were systematically eliminated in the United States. Individuals and communities with German sounding names anglicized them in order to avoid community-sponsored retribution. The German language was all but outlawed; German music could no longer be played; and sauerkraut was renamed liberty cabbage. The German-language press, which probably was the strongest of the ethnic presses at the start of the war, suffered terribly. No German newspaper was suppressed during the war, but several did lose second-class mailing privileges, or, in a few cases, all access to the mail. Most of them lost subscribers and advertisers and were as permanently crippled as the community they had served.

M. Blanchard, *Revolutionary Sparks,* p. 91 (1992). This background of discrimination against foreign language speech during the World War I era underscores the importance of the Court's refusal to subject it to reduced scrutiny in *Abrams, Frohwerk* and *Schaefer.*

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[11] Justice Brandeis' use of German in his dissent would have violated Article 28, which expressly applies to the judiciary and requires that all government "orders" be in English and "in no other language." Ariz. Const. art. XXVIII, §§ 1(3) and 3(1)(a).

Just thirteen months before the Court issued its opinion in *Abrams,* the Court of Chancery of New Jersey published its opinion in *New Yorker Staats-Zeitung* v. *Nolan,* 105 A. 72 (1918). In *Nolan* the court considered an application to enjoin the enforcement of an ordinance of the Township of North Bergen, New Jersey which prohibited "the circulation of newspapers in the German language. . . ." *Id.* In rejecting the Township's defense of the ordinance as a proper exercise of its police powers, the court noted that the federal government had sent numerous stories for the paper to publish in German:

> The government sends to the newspaper copy to be published. The government undoubtedly desires to reach a very large number of individuals of German extraction, who cannot understand English, through the medium of these newspapers so that they be advised as to the purpose of this country in the present war and so that they may be acquainted with the situation as it develops from day to day. There can be no question in my mind, but that is a wise thing to do. It is the only method of approach that can be at all efficacious. There are many thousands of Germans in this country, many of them in North Bergen, who cannot understand English. Anything which will prevent a national menace is justifiable. There is nothing more dangerous than a person left in ignorance of public events. We are confronted with a fact, not a theory. You cannot communicate with a person in a language he cannot understand. . . . My view is that the resolution, far from being in line with the war purposes of the government, is directly opposed to them.

Id. at 73. Although *New Yorker Staats-Zeitung* v. *Nolan* was not appealed, it did not escape this Court's attention and was approvingly cited in the first opinion by this Court to invalidate a state law on first amendment grounds, *Near* v. *Minnesota,* 283 U.S. 697, 719 n. 11 (1931).

Not all attempts to proscribe foreign language speech during this era were unsuccessful. In *Star Opera Company Co.* v. *Hylan,* 178 N.Y.S. 179 (Sup. Ct. 1919), the Supreme Court of New York refused to enjoin the Mayor of the City of New York from prohibiting the performance of German opera in the City. (The local American Legion had apparently persuaded the Mayor that censoring the performances was necessary to preserve the peace. *Id.*) Although the plaintiff opera company — the manager of which was "a German citizen who [was] charged with having stated that he [had] no intention of becoming an American citizen" — invoked the first amendment in its defense, the court announced (without explanation) that the "case [did] not deal with a constitutional right, or, in fact, any right at all." *Id.* at 181. (Of course, these assertions were never embraced by this Court.)

The first amendment implications of proscriptions of foreign language speech during the World War I era were not ignored by the scholarly community. In what is still one of the most influential academic tracts on free speech, *Free Speech in the United States,* Professor Zechariah Chafee of the Harvard Law School rejected any distinction between English and other languages for first amendment purposes and noted that:

> Even if it can be said the Blackstonian test [regarding prior restraints] does not forbid the government to control its own machinery, [for example,] the post-office, it is clear to every newspaper [advocating violent revolution] that its exclusion from the mails is equivalent to an absolute censorship. The same considerations apply to a censorship of the foreign language press. . . .

Id. at p. 169. In concluding that any problems arising from foreign language speech should be resolved non-coercively, Chafee argued:

> Just as the merits of free trade in goods are lessened if the normal processes of competition are checked by monopolies and dumping, so free trade in ideas requires that the barriers to the interchange of argument presented by illiteracy and foreign languages shall somehow be broken down. Aliens cannot be forced to love this country. They will love it rather because it

> does not employ force except against obviously wrongful overt acts. They will love it as the home of wise tolerance, of confidence in its own strength and freedom.

Id. at 240. These remarks reflect the principle of tolerance which predicates free speech jurisprudence.[12] *See generally,* L. Bollinger, *The Tolerant Society* (1986). As this Court acknowledged in *Meyer* v. *Nebraska,* 262 U.S. 390, 401 (1923):

> That the State may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages, as well as to those born with English on their tongue. Perhaps it would be highly advantageous if all had a ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.

See also Bartels v. *Iowa,* 262 U.S. 404 (1923), *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 262 U.S. 404, 410 (1923), *Yu Cong Eng* v. *Trinidad,* 271 U.S. 500 (1926), and *Farrington* v. *Tokushige,* 273 U.S. 284 (1927) (all invalidating foreign language proscriptions as unconstitutional).

Although *Meyer* and its progeny were decided under the due process and equal protection clauses of the fourteenth amendment, the free speech implications of the decisions were apparent to contemporary observers. Justice Brandeis — who joined the majority opinion in *Meyer* without separate comment — later indicated to Felix Frankfurter that he based his decision on the "right to . . . utter speech." M. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 Sup. Ct. Rev. 299, 320. Professor Chafee also analyzed *Meyer* v. *Nebraska* under the rubric of free speech. *See* Z. Chafee, *Free Speech in the United States,*

[12] Of course, Professor Chafee is said to have greatly influenced Justice Holmes' dissent in the *Abrams* case. *See* R. Polenberg, *Fighting Faiths: The Abrams Case, The Supreme Court, and Free Speech,* pp. 222-24 (1987).

p. 552 (1941). This Court has also characterized *Meyer* as a first amendment case. *See Griswold* v. *Connecticut,* 381 U.S. 475, 482 (1965) (citing *Meyer,* the Court noted that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge").

Whether considered under the first or fourteenth amendments, these cases collectively teach that language proscriptions suppress free speech. As this Court observed in a substantively similar context:

> We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expressing of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

Cohen v. *California,* 403 U.S. 15, 24 (1971). Of course, if a speaker has a free speech right to use profanity in a courthouse, a speaker *a fortiori* has a free speech right to use a language other than English — especially when the speaker is unable to communicate in English and is communicating with an elected representative regarding matters of public concern.

Many members of Arizonans Against Constitutional Tampering fall into this latter category of speakers. Article 28 forbids their elected representatives from providing them with information readily available to English speakers although those representatives desire to provide it. Under the first amendment, these individuals have an enforceable right to receive that information. *See Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748-757 (1976). For them, the marketplace of ideas is meaningless without a marketplace of languages.

D. Polylingualism and the Free Speech Rights of Elected Officials.

The free speech rights of elected officials are fundamental to representative government under the Constitution. These rights predate the free speech rights of members of the public at large and served as the conceptual model for the public right of "the freedom of speech" guaranteed by the first amendment. As Leonard Levy explains:

> The phrase "freedom of speech" originated in Anglo-American history during the struggle of Parliament to achieve the privilege of free debate.... Until the last quarter of the eighteenth century, freedom of speech referred not to a civil right but primarily to a parliamentary right: the legislator's immunity from punishment for anything said by him in his official capacity during a legislative session.

L. Levy, *The Emergence of a Free Press,* p. 3 (1983). *See also* Z. Chafee, *Free Speech in the United States,* p. 552 (1941) ("The earliest form of freedom of speech secured by the English Parliament was the immunity of its members from responsibility to the King or in the courts for what they said in debates").

The "parliamentary privilege" of free speech and debate enjoyed by members of Parliament in Georgian England was recognized by the British monarch when various magnates of the realm gradually forced the King to share his heretofore absolute and undivided sovereignty with them in the fifteenth century culminating in the English Bill of Rights of 1689, which declared "[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be questioned in any court or place out of Parliament." Quoted in A. White, *The Making of the English Constitution,* p. 446 (1925). The right was initially limited to members of Parliament, reflecting the fact that British sovereignty resided in the structure of government, not in the people at large. *Id.* at pp. 436-446.

The American Revolution transformed the parliamentary privilege into the "the freedom of speech" recognized by the

first amendment. *See generally* L. Levy, *The Emergence of a Free Press,* pp. 309-322 (1985). The framers of the Constitution believed that the legitimacy of government rested on the "consent of the governed." Under this theory of government, "sovereignty" rested with the people — not the King, the King-in-Parliament, Parliament alone, or any other governmental entity. *See generally* Z. Chafee, *Free Speech in the United States,* pp. 19-20 (1941) ("In the United States the people not the government possess the absolute sovereignty, and the legislature as well as the executive is under limitations of power"). As James Madison observed when arguing the unconstitutionality of the Alien and Sedition Acts, under the Constitution "[t]he people, not the government, possess absolute sovereignty." 4 *Elliot's Debates on the Adoption of the Federal Constitution,* pp. 569-570 (1845). Consequently, as attributes of sovereignty, the privileges of freedom of speech and debate rest with the people first and foremostly. *See generally* L. Levy, *The Legacy of Suppression,* p. 296 (1960) ("The intention of the framers of the First Amendment ... was to guarantee that the people possessed the same right of free discussion as their agents"). Thus, although historically "the freedom of speech" derived from and reflected the free speech rights of elected officials, this pattern was reversed by the American theory of popular sovereignty under which the free speech rights of elected officials derive from and reflect the free speech rights of the people at large. *See* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People,* p. 36 (1960).

When the people elected representatives to accomplish their collective purposes in government, the speech and debate of those representatives were to reflect the speech and debate of the people whom they represented. Jack Rakove observes that:

> If one maxim reflected Americans' ideas of representation ... it was the belief that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."

J. Rakove, *Original Meanings,* p. 203 (1996), quoting John Adams, *Thoughts on Government* (1776). This definition of representation enjoyed a consensus at the Constitutional Convention. James Wilson declared that "[t]he Legislature ought to be the most exact transcript of the whole society." *Id.* George Mason proceeded to give what Edmund Morgan describes as "the standard American meaning of representation":

> The requisites in actual representation are that the Representatives should sympathize with their constituents; should think, as they think and feel as they feel . . . so much so, that even the diseases of the people should be represented — if not, how are they to be cured?

Quoted in E. Morgan, *Inventing the People,* p. 272 (1988). This theory of representation provided the "consent" that defined republican government under the Constitution. As Professor Bailyn explains:

> Where government was such an accurate mirror of the people, sensitively reflecting their desires and feelings, consent was a continuous, everyday process. In effect the people were present through their representatives, and were themselves, step by step and point by point, acting in the conduct of public affairs. No longer merely an ultimate check on government, they *were* in some sense the government. Government had no separate existence apart from them; it was *by* the people as well as *for* the people; it gained its authority from their continuous consent.

B. Bailyn, *The Ideological Origins of the American Revolution,* p. 173 (1967). Of course, this theory of consensual representation was contingent upon the ability of the elected to freely converse with their electors. Given the ethnic make-up of the Nation at that juncture of constitutional history, such communications were inevitably sometimes in languages other than English.

The guarantee of the freedom of speech of elected officials is so fundamental to American representative democracy that the

national legal recognition of the right predated both the Constitution and the Bill of Rights. Article V of the Articles of Confederation of 1781 provided that "[f]reedom of speech and debate in Congress shall not be impeached or questioned in any Court. . . ." Not only was this right invoked in the Confederation Congress, it was expansively interpreted to achieve its representational purpose. On June 7, 1782, David Howell, Rhode Island delegate to the second Confederation Congress, was chastised by his fellow delegates for discussing Congress's latest scheme for financing the Revolution with his constituents. *See* V *Journal of the Continental Congress,* p. 571 (1782). Refusing to budge from his unfettered right to communicate with his constituents, Howell reminded his colleagues that the right of "freedom of speech and debate" guaranteed by Article V of the Articles of Confederation, included "free communication of such speeches and debates to their constituents by the members of Congress." *Id.* Howell proceeded to observe that Congress had no power "to call any member of their body to account for information which he may think proper to communicate with his constituents. . . ." *Id.* Although Howell's colleagues continued to believe that his disclosures were counterproductive, no one (including Madison) questioned the validity of the his constitutional theory. *Id.*

When the Articles of Confederation were superseded by the new Constitution in 1789, the rights of free speech and debate were retained in Article I, Section 6 ("for any speech or debate in either House, [Senators and Representatives] shall not be questioned in any other place"). Based on the understanding that these rights included the right of freedom of communications between elected officials and their constituents, as illustrated by the case of Delegate Howell above, the principle of freedom of expression was embedded in the Constitution well before the ratification of the Bill of Rights in 1791. Accordingly, James Wilson explained the purpose and scope of the speech and debate clause as follows:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness

> and success, it is indispensably necessary, that he should enjoy the *fullest* liberty of speech, and that he should be protected from the resentment of *every* one, however powerful, to whom the exercise of that liberty may occasion offense.

II *Works of James Wilson*, p. 38 (Andrews ed. 1896) (emphasis added).

Indeed, even without a textual predicate for the protection of communications between constituents and representatives, the right to engage in such communications is inherent in the very concept of representative government. *See generally* C. Black, *Structure and Relationship in Constitutional Law,* pp. 35-42 (1965). Accordingly, this right was probably applicable against state governments under Article IV, Section 4 of the Constitution ("The United States shall guarantee to every state in this Union a republican form of government"). *See generally,* A. Amar, *The Bill of Rights As A Constitution,* 100 Yale L. J. 1131, 1149 (1991).

Although the principle of freedom of speech inhered in the original constitutional structure, it found its richest textual expression in the first amendment. The amendment "obviously sounds in structure and focuses . . . on the representational linkage between Congress and its constituents." A. Amar, *The Bill of Rights as a Constitution,* 100 Yale L. J. 1131, 1147 (1991). The amendment also protects the deliberative process attendant to representative democracy. *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960). As this Court stated in *New York Times* v. *Sullivan,* 376 U.S. 254, 269 (1964):

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes by the people. The maintenance of the opportunity for free political discussion to the end that government be responsive to the will of the people and that changes may be obtained by

> lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. . . . The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selections. To many this is, and always will be, folly; but we have staked upon it our all."

(Citations and internal quotation marks omitted.) Of course, this "multitude of tongues" necessarily includes a multitude of different languages.

The application of these free speech principles to elected officials is illustrated by this Court's unanimous opinion in *Bond* v. *Floyd,* 385 U.S. 116 (1966). In *Bond* the Court considered a first amendment challenge to the Georgia House of Representatives' refusal to seat Julian Bond upon his lawful election to office based on his public criticism of the Vietnam War. In reversing the Georgia House's decision to exclude Mr. Bond, in words that echo James Wilson, the Court stated that the first amendment requires that elected officials "be given the *widest* latitude to express their views of policy" and that elected officials were entitled to as much protection under the first amendment as members of the public at large. *Id.* at 136 (Emphasis added.) This "wide latitude" necessarily includes the right to choose the linguistic means by which to communicate with constituents. This is especially true when some of those constituents — like many members of Arizonans Against Constitutional Tampering — are unable to communicate effectively in English.

Judge Brunetti eloquently summarized these essential free speech principles in his concurring opinion below:

> Article [28] offends the First Amendment not merely because it attempts to regulate ordinary speech, but because it attempts to manipulate the political process by regulating the speech of elected officials. Freedom of speech is the foundation of our democratic process, and

> the language restrictions of Article [28] stifle informative inquiry and advocacy by elected officials. By restricting the free communication of ideas between elected officials and the people they serve, Article [28] threatens the very survival of our democratic society. . . . Elected representatives cannot fully serve their constituents if they are precluded from fully expressing their views to, and learning the views of, those constituents. The First Amendment precludes an electoral majority from restricting political communications with a certain segment of the electorate.

Yniquez v. *Arizonans for Official English*, 69 F.3d 920, 950-951 (9th Cir. 1995) (Brunetti, J., concurring) Petitioners' Appendix, pp 62-64. This reasoning reflects this Court's settled understanding of "the central meaning of the First Amendment." *New York Times* v. *Sullivan*, 376 U.S. 254, 273 (1963).

By impeding — and in some cases eliminating altogether — communications between elected officials and their constituents, Article 28 violates the most basic elements of free speech.

III. This Dispute Presents A Case or Controversy.[13]

Arizonans Against Constitutional Tampering ("AACT") is a unincorporated political action committee consisting of state elected officials, public school educators, state employees, and private citizens who routinely communicate in languages other than English during the performance of government business. *See* AACT's Appendix, pp. 2-4. AACT was established in 1988 to oppose the passage of Article 28 and to protect the free speech rights of its members in the event of its passage. *Id.* As discussed above, the foreign language communications in which members of AACT engage include the rendering and receipt of speech involving matters of public concern.

As petitioners' chief political adversary in the 1988 Arizona general election, AACT officially opposed the adoption of Article 28 in the official "Arizona Publicity Pamphlet" prepared

[13] AACT also joins in petitioners' arguments regarding Article III requirements.

by the Arizona Secretary of State pursuant to A.R.S § 19-123. *See* "Argument Against Proposition 106," Joint Appendix, pp. 39-40. Thus, the State of Arizona officially recognized AACT's special interest in Article 28 even prior to its adoption.

AACT's free speech interests in this litigation are so obvious and indisputable that the Attorney General of Arizona did *not* oppose AACT's successful motion to intervene as a plaintiff in this proceeding, although the Attorney General had previously suggested that respondent Yniguez lacked standing to proceed with this dispute. Indeed, AACT intervened in this matter in order to preclude the waste of private and public resources that the Attorney General's present contentions regarding standing concede but nonetheless invite. *See* AACT's Appendix, p. 3 ("To preclude any possibility of mootness in this proceeding, AACT and Mr. Espinosa move to intervene as plaintiffs-appellees in this appeal").

In *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 757 (1976), this Court recognized that the first amendment protects the right to render and receive information. *Id.*[14] The Court also concluded that the recipients of constitutionally-protected communications have Article III standing to protect their right to receive such communications. As the Court explained:

> [W]here a speaker exists, as in the case here, the protection afforded [under the first amendment] is to the communication, to its source and to its recipients both. . . . [If] there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by [the consumers here].

Id. This principle of standing is clearly applicable to this case.

The law at issue in *Virginia Pharmacy Board* prohibited pharmacists from advertising prescription drug prices. The law was

[14] *See also Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (recognizing the right of consumers of legal services to receive truthful advertising regarding the availability of legal services).

challenged by a group of prescription drug consumers — the "Virginia Consumer Board" — whose members desired the benefit of having price information in the marketplace. (AACT is analogous to the Virginia Consumer Board.) In invalidating the law on first amendment grounds, the Court emphasized that the public's interest would be best served by the free exchange of commercial information. This reasoning applies with even greater force in this case given the fact that Article 28 proscribes core political speech. Constituents indisputably have a greater first amendment right to receive voluntary communications from their elected representatives on matters of public concern than to receive commercial communications.[15]

Because Article 28 abridges core political speech which the members of AACT have a first amendment right to receive and impart, AACT has standing to challenge Article 28. A contrary conclusion would elevate the protection afforded commercial speech under the first amendment above the protection afforded political speech, a truly radical departure from this Court's long-standing free speech jurisprudence.

[15] *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, p. 53 (1960) ("The essential point is not that the alien has a right to speak but that we citizens have a right to hear him").

CONCLUSION

For these reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

Stephen G. Montoya
Counsel of Record
Albert M. Flores
George Robles Vice III
Of Counsel
337 North Fourth Avenue
Phoenix, Arizona
85003-1572
(602) 271-0070
(fax) 252-1922

July 26, 1996

No. 95-974

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH AND
ROBERT D. PARK,
PETITIONERS,

v.

STATE OF ARIZONA; MARIA-KELLEY F. YNIGUEZ;
JAIME GUTIERREZ; AND ARIZONANS AGAINST
CONSTITUTIONAL TAMPERING,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO RESPONDENT ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOSA'S BRIEF IN SUPPORT OF JUDGMENT

STEPHEN G. MONTOYA
Counsel of Record
ALBERT M. FLORES
GEORGE ROBLES VICE III
Of Counsel
337 North Fourth Avenue
Phoenix, Arizona
85003-1572
(602) 271-0070

Attorneys for Respondents
Arizonans Against Constitutional Tampering
and Thomas Espinosa

July 26, 1996

No. 92-17087, 93-15061 and 93-15719 (Consolidated Appeal)
D.C. No. CV88-1854-PGR

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

MARIA-KELLEY F. YNIGUEZ: JAIME P. GUTIERREZ,
PLAINTIFFS-APPELLEES,

v.

STATE OF ARIZONA; ROSE MOFFORD;
ROBERT CORBON; et al.
DEFENDANTS-APPELLEES,

v.

ARIZONANS FOR OFFICIAL ENGLISH;
ROBERT D. PARK,
INTERVENORS-DEFENDANTS-APPELLENTS.

MARIA-KELLEY F. YNIGUEZ,
PLAINTIFFS-APPELLANT,

v.

STATE OF ARIZONA; ROSE MOFFORD;
ROBERT CORBIN; et al.,
DEFENDANTS-APPELLEES.

ARIZONANS AGAINST CONSTITUTIONAL TAMPERING AND THOMAS ESPINOZA'S MOTION TO INTERVENE AS PLAINTIFFS-APPELLEES

STEPHEN G. MONTOYA
GEORGE VICE III
BRYAN CAVE
2800 North Central Avenue, 21st Floor
Phoenix, Arizona 85004-1019

Attorneys for proposed intervenor-appellees

July 26, 1996

Pursuant to Rule 27, Federal Rules of Appellate Procedure, and Rule 24, Federal Rules of Civil Procedure, Arizonans Against Constitutional Tampering ("AACT") and its chairperson, Thomas Espinoza, move to intervene as plaintiffs-appellees in this proceeding. This motion is supported by the following memorandum of points and authorities.

RESPECTFULLY SUBMITTED this 25th day of May, 1994.

BRYAN CAVE

By:_____

Stephen G. Montoya
George Vice III
2800 N. Central Ave., 21st Flr.
Phoenix, Arizona 85004
Attorneys for Proposed Intervenors-Appellees Arizonans Against Constitutional Tampering and Thomas Espinoza

MEMORANDUM OF POINTS AND AUTHORITIES

Arizonans Against Constitutional Tampering ("AACT") is a political action committee which was organized in 1988 by citizens of Arizona in opposition to intervenors-appellants, Arizonas for Official English Committee. Thomas Espinoza has been a member of AACT since 1988 and has been chairperson of AACT since May 19, 1994. AACT and Mr. Espinoza campaigned against the ballot initiative officially sponsored by intervenors-appellants proposing the adoption of Article 28 to the Arizona Constitution. In the Arizona general election of November, 1988, a majority of voters participating in the election approved the adoption of Article 28 by an approximate one-half of one percent margin.

During the campaign preceeding the adoption of Article 28, an official "Arizona Publicity Pamphlet" was created by the Arizona Secretary of State and distributed pursuant to A.R.S. § 19-123. The publicity pamphlet set forth (1) the text of Article 28 (then known as Proposition 106), (2) the Legislative Council's analysis of Article 28, and (3) arguments for and against Article 28. AACT, through its former chairperson, then Arizona State Representative Armando Ruiz, submitted an "ARGUMENT 'AGAINST' PROPOSITION 106" pursuant to A.R.S. § 19-124. *See* attached Exhibit "A." Correspondingly, intervenors-appellants submitted an "ARGUMENT 'FOR' PROPOSITION 106." *See* attached Exhibit "B". Thus, intervenors-appellants and AACT and Mr. Espinoza are political counterpoints with diametrically opposed interests regarding the consitutionality of Article 28 and this appeal.

This Court has recognized intervenors-appellants' standing to intervene for purposes of appeal under both Article III of the United States Constitution and Fed. R. Civ. P. 24. *See Yniguez* v. *State of Ariz.*, 939 F.2d 727, 733 (9th Cir. 1991). Because AACT and Mr. Espinoza are intervenors-appellants' political counterpoints in connection with Article 28, AACT and Mr. Espinoza have the same interests in having Article 28 declared unconstitutional as intervenors-appellants have in

having Article 28 declared constitutional. Consequently, AACT and Mr. Espinoza have standing to intervene in this appeal for the same reasons that intervenors-appellants had standing to intervene for purposes of appeal. AACT's interests in this appeal were acknowledged by this Court in granting AACT leave to appear as *amicus curiae* and to participate in the oral argument on the merits.

Up to this juncture, plaintiff-appellee has adequately defended the preservation of the district court's judgment declaring Article 28 void. However, the State of Arizona has suggested that this appeal is "moot" because plaintiff-appellee is no longer employed by the State. *See Yniguez* v. *Arizona*, 975 F.2d 646, 647 (9th. 1992). While this Court has properly rejected the State's suggestion of mootness, *Id.*, other cases have been dismissed as moot based on the appellee's lack of government employment during the pendency of appeal and the question of mootness may arise again as this appeal progresses. *See, e.g., Gutierrez* v. *Municipal Court of the Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988), *reh'g en banc denied*, 861 F.2d 1187 (1988), *vacated as moot*, 490 U.S. 1016 (1989). Significantly, this Court has acknowledged that any potential for "mootness [in this appeal] may be avoided by the intervention of a new plaintiff whose claim against the operation of the English only provision is not moot." *Yniquez* v. *Arizona*, 975 F.2d 646, 648 (9th. 1992).

To preclude any possibility of mootness in this proceeding, AACT and Mr. Espinoza hereby move to intervene as plaintiffs-appellees in this appeal. This intervention will not prejudice intervenors-appellants any more than intervenors-appellants prejudiced plaintiff-appellee by intervening for purposes of appeal. Moreover, because AACT has already participated in this appeal as an *amicus curiae*, no further briefing will be required as a result of AACT and Mr. Espinoza's intervention as a plaintiffs-appellees.

In addition, by foreclosing the possibility of mootness of this appeal, AACT and Mr. Espinoza's proposed intervention will prevent any judicial resources being wasted as a result of

AACT and Mr. Espinoza's filing of a new action in the district court in the event that this appeal were to be dismissed as moot.

For the foregoing reasons, AACT and Thomas Espinoza's motion to intervene as plaintiffs-appellees should be granted.

RESPECTFULLY SUBMITTED this 25th day of May, 1994.

BRYAN CAVE

By: _____

Stephen G. Montoya
George Vice III
2800 N. Central Ave., 21st Flr.
Phoenix, Arizona 85004
Attorneys for Arizonans Against Constitutional Tampering and Thomas Espinoza

ORIGINAL and four copies of the foregoing Motion sent by overnight delivery this 25th day of May, 1994, to:

Ms. Cathy A. Catterson
Clerk of the Court
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
2nd Floor, Room 205
121 Spear Street
San Francisco, California 94105

and one COPY sent by first class mail this same date to:

Barnaby W. Zall, Esq.
WILLIAMS & JENSEN, P.C.
Three Lafayette Center, 3rd Flr.
1155 - 21st Street, N.W.
Washington, D.C. 20036
Attorneys for Intervenors/Appellants

Robert J. Pohlman, Esq.
RYLEY, CARLOCK & APPLEWHITE, P.A.
101 N. First Ave., Ste. 2700
Phoenix, Arizona 85003-1973
Attorneys for Plaintiff/Appellee Maria-Kelly F. Yniguez

Rebecca White Berch
Solicitor General
1275 W. Washington Street
Phoenix, Arizona 85007
Attorneys for State Parties

James F. Henderson, Esq.
SCULT, FRENCH, ZWILLINGER & SMOCK
One Arizona Center, 11th Floor
400 East Van Buren Street
Phoenix, Arizona 85001-0870
Attorneys for Intervenors/Appellants

by _____
for BRYAN CAVE